

CAN FMS SALE PROCEEDS BE USED TO BUY MORE THAN THE QUANTITY SOLD?

Recently, questions have arisen at this command regarding use of the proceeds of sales from stock to FMS customers to acquire more than the quantity originally sold to the FMS customer. After a review of the applicable statutes and regulations, it appears that acquiring more than the replacement quantity from the proceeds of an FMS sale from stock would be improper.

22 USC 2761(a)(1) authorizes the executive branch to sell defense articles out of stock to FMS customers. It doesn't address the disposition of the proceeds of these sales. However, it does provide that (a) if the article is not to be replaced, the amount to be paid by the FMS customer shall be not less than the actual value of the article, and (b) if the article is intended to be replaced at the time of sale agreement, the amount charged shall be "the estimated cost of replacement including the cost or production costs less any depreciation in the value of such article". Clearly, intentionally charging an FMS customer more than the "estimated cost of replacement . . ." violates this statutory requirement.

10 USC 114 (c)(2) provides that amounts received under 22 USC 2761(a)(1) shall either be deposited in the Special Defense Acquisition Fund, subject to its statutory limit, or as miscellaneous receipts in the US Treasury. It does not explicitly address using any of these amounts for replacement of the articles sold to the FMS customer. Also, it negates certain language in 22 USC 2777(a) that provided for return of such sale proceeds to the military departments. 10 USC 114(c)(2) was added as part of the 1990 DoD Authorization Act.

Paragraph 070302 (C) of Chapter 7, volume 15 of the DoD Financial Management Regulations, DoD 7000.14-R, provides that when an item is sold from the stocks of the department and that item is not intended to be replaced, the proceeds of the sale will be disposed in accordance with 10 USC 114(c)(2). This regulation is an apparent interpretation of the inter-relationship of the 22 USC 2761(a)(1) and 10 USC 114(c)(2) since it allows use of the sales proceeds to replace the article sold, a provision implicit in 22 USC 2761(a)(1) but not addressed in 10 USC 114(c)(2). This regulation does not explicitly address the situation where the proceeds of the sale are more than sufficient to replace the articles sold.

Based on the foregoing authorities, it seems certain that the proceeds of an FMS sale from stock can be used only to replace the quantity originally sold and that any excess must be deposited in accordance with 10 USC 114(c)(2).

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